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No. 96-1559

In the Supreme Court of the United States

OCTOBER TERM, 1996

CHARLES OWENS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court correctly instructed the jury on the *mens rea* required for a violation of 26 U.S.C. 5861(d), which prohibits possession of an unregistered, short-barreled firearm.

2. Whether Section 5861(d) is unconstitutionally vague.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A7) is reported at 103 F.3d 953.

JURISDICTION

The judgment of the court of appeals was entered on January 22, 1997. A petition for rehearing was denied on March 7, 1997. Pet. App. A8-A9. The petition for a writ of certiorari was filed on April 2, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Florida, petitioner was convicted of possessing an unregistered, short-

barreled firearm in violation of 26 U.S.C. 5861(d). The district court sentenced him to a term of 33 months' imprisonment, to be followed by three years of supervised release, and fined him $1,000.[1] The court of appeals affirmed. Pet. App. A1-A7.

1. Petitioner was a part-time employee at a gun store called the Sports and Athletic Consignment Shop in Tallahassee, Florida. Howell Williams, the owner of the business, had accepted an Uzi mini-carbine with a long barrel on consignment from Lee Minor. Minor later brought a short barrel to Howell Williams to fit the Uzi rifle, and told Howell Williams that the weapon needed to be registered with a Class III gun dealer. Gov't C.A. Br. 2.

On September 29, 1994, Bill Maxey, a United States Customs agent and a federal firearms licensee, went to Howell Williams's gun shop on his lunch hour to "just look around." Petitioner showed Maxey an Uzi mini-carbine with a short barrel, a longer barrel, a flash suppressor, and a carrying case. Maxey asked petitioner if the short barrel fit in the Uzi carbine, and petitioner placed the short barrel in the weapon. Howell Williams joined the two men while petitioner was putting other attachments on the weapon. Maxey was aware that a short-barreled rifle was required to be registered. He questioned Howell Williams and petitioner about registration requirements for the weapon. Howell Williams said the requirement was contingent on the manner in which the weapon was

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[1] Petitioner's co-defendant, Howell Williams, pleaded guilty to the misdemeanor of making a false entry in records required to be kept by a federally licensed firearms dealer in violation of 18 U.S.C. 922(m) and 924(a)(3). See Gov't C.A. Br. 1.

recorded on ATF Form 4473.[2] According to Howell Williams, if the weapon was recorded as a handgun, not a rifle, it would be legal to put the short barrel on it and use it. Petitioner agreed with Howell Williams. The next day, Maxey called ATF Special Agent Don Williams to report what had transpired at the gun shop. Gov't C.A. Br. 2-3.

On October 5, 1994, Don Williams went to the gun shop and posed as a customer interested in buying the Uzi mini-carbine. Don Williams wore a recording device and other agents were stationed outside the store. Petitioner, the only employee in the store at that time, showed the Uzi to Don Williams. Petitioner offered the weapon, along with six magazines, two barrels (a seven-inch barrel and a 19 3/4-inch barrel), and multiple accessories, for $1,795. Gov't C.A. Br. 3.

While selling the weapon to Don Williams, petitioner placed the seven-inch barrel in the carbine. During the conversation, petitioner advised Don Williams about how to circumvent the law by making sure that the Uzi was classified as a pistol, not a rifle, at the time of sale. Petitioner told Don Williams that, if classified as a pistol, the weapon could be carried concealed, with a permit. Petitioner assured Don Williams that the authorities could do nothing about his possession of the short-barreled carbine provided it had been classified as a pistol when sold. Petitioner also advised Don Williams that the weapon did not have to be registered with anyone. Gov't C.A. Br. 3-5.

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[2] ATF Form 4473 is completed when a weapon is sold in a gun shop. The form provides information to ATF about the purchaser and the type of weapon sold. Gov't C.A. Br. 3 n.1.

Howell Williams came into the store as the purchase of the weapon was being completed. Don Williams asked him about the short barrel. Howell Williams said that he was not sure about it, and would have to refer to the Uzi manual. The manual stated that the weapon was a mini Uzi automatic carbine. Howell Williams said that he would let the "feds" argue about it, and instructed Don Williams not to put the short barrel on the rifle while in the store. Howell Williams knew that a carbine is a rifle, and that the short barrel should not accompany the gun unless it was registered. Gov't C.A. Br. 5.

2. At the charging conference held after the government presented its case, petitioner requested, in reliance on *Staples* v. *United States*, 511 U.S. 600 (1994), that the jury be instructed that, in order to convict him of a violation of 26 U.S.C. 5861(d), it had to find that he knew that the weapon was required to be registered under the National Firearms Act (NFA). After a review of *Staples*, the district court rejected the instruction. It concluded instead that the jury was required to find only that petitioner knew the characteristics of the weapon that made it subject to registration. Gov't C.A. Br. 8.[3]

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[3] In pertinent part, the district court instructed the jury as follows:

> The defendant can be found guilty of this offense charged in this indictment only if the following facts are proved beyond a reasonable doubt * * *: First, that the defendant knowingly possessed a rifle having a barrel less than 16 inches in length; and second, that this short-barreled rifle was not then registered to the defendant in the National Firearms Registration and Transfer Record. It is not necessary for the government to prove that the defendant knew that the

3. Petitioner testified in his own defense. He denied showing the weapon to Maxey, attempted to establish an alibi with records from another place of employment, claimed that he had not been fully trained by the gun shop, suggested that he knew little about firearms, denied attaching the seven-inch barrel to the carbine, and stated that he was merely a "volunteer" at the gun shop, without liability for what happened there. Gov't C.A. Br. 5-6.

4. The court of appeals affirmed. Pet. App. A1-A7. Noting that the jury had found that petitioner "assembled the weapon with the seven-inch barrel, and as assembled it was clearly an unregistered rifle 'having a barrel * * * of less than 16 inches in length,'" the court rejected petitioner's claim that the statute he was charged with violating was unconstitutionally vague as applied to him. Pet. App. A3 (quoting 26 U.S.C. 5845(a)(3)). The court of appeals further observed that, because the statute was not vague as applied to petitioner, it had no occasion to consider whether the statute would be vague if applied to other defendants. *Ibid.*

The court of appeals also rejected petitioner's claim that the district court erred in declining to instruct the jury that the government had to prove not only that petitioner knowingly possessed a rifle with a barrel of less than 16 inches, but also that petitioner knew that the firearm had to be registered under the NFA. Pet. App. A4-A5. The court reasoned (*ibid.*) that, although *Staples* requires the government to

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item described in the indictment was a firearm that the law requires to be registered.

Pet. App. A4. That instruction followed the Eleventh Circuit Pattern Jury Instructions. See *id.* at A10.

prove that a defendant knew the features of a firearm that brought it within the NFA's registration requirements, that case does not require the government to prove that the defendant was aware that the firearm had to be registered.[4]

ARGUMENT

1. Petitioner contends (Pet. 13-15) that the Eleventh Circuit's pattern jury instruction on the elements of a violation of 26 U.S.C. 5861(d), which the district court followed here, fails to convey the *mens rea* requirement announced in *Staples* v. *United States*, 511 U.S. 600 (1994). The courts below properly rejected that argument.

The "narrow" holding of *Staples* requires the government to prove a defendant's "[knowledge] of the features of [the weapon] that brought it within the scope of the [NFA]." 511 U.S. at 619. It does not require the government to prove that the defendant knew that the firearm he possessed was required to be registered under the Act. See *id.* at 608-610; see also *id.* at 622 n.3 (Ginsburg, J., concurring in the judgment) ("a defendant who knows he possesses a weapon with all of the characteristics that subject it to registration, but was unaware of the registration requirement, * * * may be convicted under § 5861(d)"); *United States* v. *Freed*, 401 U.S. 601, 607 (1971) (Section 5861(d) does not require government to prove that defendant knew grenades in his possession were unregistered); accord *United States* v.

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[4] Petitioner had also argued (Pet. C.A. Br. 41-43) that the evidence was insufficient to show possession of the weapon. The court of appeals found the evidence of possession "ample," and rejected petitioner's other arguments on appeal with little or no discussion. Pet. App. A5-A7 nn.1, 4-5.

Edwards, 90 F.3d 199, 202 & n.3 (7th Cir. 1996) (*Staples* requires gun owners "to be aware of the particular characteristics that bring their firearm within the statutory definition"; once such knowledge "is proven, the holding of *Freed* would suggest that strict liability kicks in with respect to registration"); *United States* v. *Mains*, 33 F.3d 1222, 1229 (10th Cir. 1994) (jury instruction requiring defendant to have "knowingly possessed a shotgun with a barrel length of less than 18 inches or an overall length less than 26 inches" is consistent with *Staples*; government is not required to prove defendant knew that such possession was prohibited under NFA). Accordingly, as the court of appeals correctly held (Pet. App. A4-A5), the district court did not err in the instruction it gave the jury as to the *mens rea* required for a violation of Section 5861(d).[5]

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[5] Petitioner notes (Pet. 14) that the Eleventh Circuit has also addressed the instruction required under *Staples* in *United States* v. *Rogers*, 94 F.3d 1519 (1996). On May 27, 1997, this Court granted certiorari in *Rogers*, limited to the question whether a district court's failure to instruct the jury on an element of an offense is harmless error where, at trial, the defendant admitted that element. *Rogers* v. *United States*, No. 96-1279. Because the court of appeals in this case held that there was no instructional error, the harmless-error issue the Court will review in *Rogers* is not presented here. Moreover, the court of appeals in this case distinguished *Rogers* on the ground that the jury in that case was not told that "the defendant had to know the weapon had the characteristics or features that brought it within the scope of the NFA." Pet. App. A7 n.5. In any event, any conflict between *Rogers* and the decision in this case would be a matter for the court of appeals, not this Court, to resolve. See *Wisniewski* v. *United States*, 353 U.S. 901 (1957) (per curiam).

Petitioner suggests (Pet. 15-17) as a basis for review that the courts of appeals are in conflict over whether *Staples' mens rea* requirement applies to prosecutions under Section 5861(d) for possession of sawed-off shotguns. Compare *Edwards*, 90 F.3d at 204 (government required to prove defendant knew sawed-off shotgun barrel was shorter than 18 inches) and *Mains*, 33 F.3d at 1229-1230 (jury required to find defendant knew sawed-off shotgun was less than 26 inches long or its barrel was shorter than 18 inches) with *United States* v. *Barr*, 32 F.3d 1320, 1324 (8th Cir. 1994) (because sawed-off shotgun "is clearly not a traditionally lawful weapon," defendant "had no legitimate expectation that the weapon was not subject to regulation," and *Staples* did not require government to prove "defendant knew of the specific characteristics which make the weapon subject to the [NFA]"); see also *United States* v. *Moore*, 97 F.3d 561, 564 (D.C. Cir. 1996) (recognizing disagreement among courts of appeals in application of *Staples* to possession of sawed-off shotguns). This case, however, does not involve that conflict because petitioner was convicted of possessing an unregistered short-barreled rifle, not a sawed-off shotgun. In any event, petitioner would not stand to benefit from review of that claim because the court of appeals held that *Staples* applied to this case and that the jury was instructed to find and did find that petitioner knowingly possessed a rifle with characteristics that made it subject to regulation. Pet. App. A3-A4.[6]

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[6] As noted above, in cases involving sawed-off shotguns, some courts of appeals would not require that the jury be instructed to make such a finding. The Department of Justice, however, has instructed prosecutors that, in all prosecutions

2. Petitioner also argues (Pet. 17-22) that, because he did not know that the Uzi mini-carbine had the characteristics of a rifle instead of a pistol, his conduct was not criminal, and that, because Section 5861(d) is ambiguous, it cannot be constitutionally applied to him. The court of appeals correctly rejected those claims.

The NFA makes it unlawful for any person to "possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record." 26 U.S.C. 5861(d). In pertinent part, 26 U.S.C. 5845 defines a "firearm" as "a rifle having a barrel or barrels of less than 16 inches in length." 26 U.S.C. 5845(a)(3). A "rifle" is defined in 26 U.S.C. 5845(c) as

> a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed cartridge to fire only a single projectile through a rifled bore for each single pull of the trigger, and shall include any such weapon which may be readily restored to fire a fixed cartridge.

Petitioner's claim fails because the evidence showed and, by its guilty verdict, the jury found that petitioner possessed the weapon with a seven-inch barrel. As thus assembled, the weapon was an unregistered rifle "having a barrel * * * of less than 16 inches in length." Because petitioner possessed such

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under Section 5861(d), the government must prove that the defendant knew the features of the firearm that brought it within the scope of the statute and that the defendant is entitled to an instruction to that effect.

a weapon, the NFA was not unconstitutionally ambiguous as applied to him, and potential ambiguities in the NFA's application to other litigants is irrelevant. See, *e.g.*, *Chapman* v. *United States*, 500 U.S. 453, 467 (1991); *United States* v. *Powell*, 423 U.S. 87, 92 (1975).

In support of his argument that Section 5861(d) is so ambiguous that it cannot be constitutionally applied to him, petitioner relies (*e.g.*, Pet. 21) on the plurality opinion in *United States* v. *Thompson/Center Arms Co.*, 504 U.S. 505 (1992). That case, however, is inapposite. Applying the rule of lenity, the plurality in *Thompson/Center Arms Co.* concluded (*id.* at 507, 517-518) that the mere packaging of a pistol with a carbine kit containing a rifle stock that permitted the conversion of the pistol into a short-barreled rifle did not create a short-barreled rifle that is regulated under the NFA. Because the present case involves not the mere packaging of disassembled firearm parts, but rather an assembled short-barreled rifle, the finding of ambiguity in *Thompson/Center Arms Co.* has no application to this case.

Finally, in a variation of his claim that there was insufficient evidence to support his conviction, petitioner contends (Pet. 22-24) that Congress intended that Section 5861(d) be applied to "the underworld, those in the underhanded business of dealing instruments intended for death and destruction," not the "innocent conduct of a part-time sales clerk" in a gun shop. That claim should also be rejected.

As with the Racketeer Influenced and Corrupt Organizations Act (RICO), which is aimed at organized crime but reaches all who fall within the statutory requirements, the scope of Section 5861(d) is not limited to the specific class of criminals that prompted its enactment. See *Sedima, S.P.R.L.* v. *Imrex Co.*,

473 U.S. 479, 497-500 (1985) (civil RICO reaches respected and legitimate businesses as well as mobsters and organized criminals); *United States* v. *Turkette*, 452 U.S. 576, 588-593 (1981) (RICO's broad definition of "enterprise" includes criminal enterprises as well as legitimate businesses that might be infiltrated by organized crime). The record in this case contains ample evidence from which a reasonable jury could conclude that petitioner knowingly possessed a rifle with a barrel less than 16 inches long, and Section 5861(d) requires no more. Moreover, regardless of petitioner's personal characteristics, prosecution of persons illegally possessing short-barreled firearms is relevant to preventing the harm that could result from the sale or transfer of such weapons to persons petitioner describes (Pet. 22) as "the underworld, those in the underhanded business of dealing instruments intended for death and destruction."[7]

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[7] Petitioner also notes (Pet. 18) that his co-defendant, Howell Williams, who pleaded guilty to keeping false records, received more lenient treatment. The disposition of charges against Howell Williams has no relevance to petitioner's claims.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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